NO. 270

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1968

Paul Penjaska and John Penjaska, Petitioners

V.

Goodbody & Company

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

Paul Penjaska
2220 W. Mason Rd.
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CITATIONS

76 A L R 1527

15 U. S. C. A. 78

U. S. v. McDermott 131 F 2d 313
Cert. Den. 318 U.S. 765

1 - 100 A L R 2d Pages 345 - 351

28 U. S. Code 1257 (3)

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Petitioners respectfully request that this Court grant rehearing of its order dated October 14, 1968 which denied certiorari, and that the Court now grant certiorari.

Jurisdiction of the Court is invoked under 28 U.S. Code 1257 (3).

The petitioners present the following questions:

(1). Has the law pretaining to stock credit on margin, 76 ALR 1527, which the Michigan Courts enforced against petitioners, been made obsolete by Congressional enactment of 15 U.S.C.A. 78 ?
(See references for points in Headnotes, 8 Mich. App. 64).

(2). Can the Courts enforce a judgment based on a law which was made inoperative by superseding legislation enacted by Congress ?

The Michigan Court of Appeals, in affirming the trial court judgment against petitioners, based its decision on 76 ALR 1527 which was copyrighted in 1932 prior to enactment of 15 U.S.C.A. 78 and which concerns the " rights and duties of stockbroker and customer respectively where demand for additional margins is not complied with ". The Michigan Supreme Court upheld this decision.

76 ALR 1527 contains an annotation appended to a stock case, Spicer v. Hincks 113 Conn. 366 (June 22, 1931). It is divided into five parts of which part II (duty of a broker to close transaction) and part III (waiver of broker's right to close transaction) are pertinent to this case.

76 ALR 1527 is the authority relied upon by the Michigan Courts for points made in head notes 2, 4, 5, and 6, their essence being that a broker is not compelled to sell stock where a customer fails to comply with his request for more margin even though the account is undermargined in violation of the rules of the exchange and that broker may waive his right to sell the stock and give the customer more time in which to give additional margins. It was further held that a broker could recover any stock losses incurred by him thereby, upon sale of stock purchased by customer.

Paragraph II of 76 ALR 1527 states that broker has no legal duty to sell stock even when margin is exhausted. (Rubin v. Salomon, 241 N. Y. Supp. 495, 1930), and that no authority imposes an obligation upon broker to sell shares during a falling market after customer fails to furnish margin and that broker is not responsible for any loss to customer. (Kerr v. Murton 7 Ont. L. Rep. 751, 1904).

Petitioners maintain that the legal doctrine enunciated in paragraph II and III of 76 ALR 1527, concerning rights and duties of stockbroker and customer respectively where demand for additional margin is not complied with has been made inoperative in regard to the minimum margins which may be initally extended and subsequently maintained on any security registered on a national exchange, by enactment by Congress of 15 USCA 78 in 1934. It is noted that cases cited in 76 ALR 1527, paragraphs II and III were decided prior to the Act of 1934.

15 USCA Para. 78 is a federal statute enacted by Congress in 1934 to provide for regulation and control of credit that may be initially extended and subsequently maintained on any

security registered on a national securities exchange. (78g). It states that it shall be unlawful for any member of a national securities exchange or any broker or dealer who transacts business through the medium of any such member, directly or indirectly to extend or maintain credit or arrange for the extension or maintenance of credit to or for any customer on any security registered on a national securities exchange, in contravention of the rules and regulations which the Board of Governors of the Federal Reserve Board shall prescribe ------.

15 USCA 78g became effective October 1, 1934. (78hh-1). It is in contrast with the unrestricted credit extension and maintenance by a broker to his customer that prevailed prior to 1934 as described in para. III of 76 ALR 1527.

Paragraph III of 76 ALR 1527 states that, " even though a broker has a right to demand additional margin, and, on the customers refusal to give it, to sell the stock, yet he can waive it and give the customer more time in which to give additional margin. " Clark v. Meigs (1863). 10 BOSW. (N. Y.-) 337.

In contrast, 15 USCA paragraph 78cc contains a non-waiver provision whereby a broker may not waive compliance with 15 USCA 78g or with any provision of the title or rule or of any regulation thereunder or of any rule of an exchange required thereby. (78cc).

The Federal Reserve Board would be ousted of authority to restrict the use of credit for the purchase or carrying of securities (15 USCA 78g, 78w) if the broker had no legal duty to sell the stock when the customer failed to provide additional margin

as stated in paragraph II of 76 ALR 1527. The Securities Exchange Commission would likewise be stripped of power to enforce compliance with provisions of 15 USCA 78 by a member of a national securities exchange.

In U.S. v. McDermott 131 F 2d 313 Cert. Den. 765 it was held to be a criminal violation to extend and maintain credit by a member of the New York Stock Exchange to a customer in contravention of Federal Margin requirements of the Securities Exchange Act of 1934. (15 U.S.C.A. 78).

In the instant case Goodbody & Co. failed to liquidate petitioners undermargined account promptly and unlawfully extended and maintained credit. Goodbody & Co. are members of the New York Stock Exchange, a national securities exchange. The securities involved were registered and trading on the New York Stock Exchange.

The pertinent law applicable to the instant case is annotated in 1-100 ALR 2d " Securities Regulations " page 345 - 351, para. 16. These legal principals concerning the rights and duties of stockbrokers and customers respectively in regard to margin maintenance supersedes those outlined in paragraph II and III of 76 ALR 1527.

Paragraph 16, page 351 (1-100) ALR, " Securities Regulations " states:

" The federal securities laws require a high state of honesty and morality of brokers and dealers in transactions with customers; the law is violated by the broker and the customer may recover from him any loss proximately resulting therefrom where --- he extends credit to a customer in violation of the Act or regulations promulgated pursuant thereto. " Smith v. Bear. 60 ALR 2d 1119.

The Securities Exchange Commission promulgated regulations pursuant to the Act, applicable to the securities involved as outlined in petitioners appeal papers. These regulations effected the duty of Goodbody & Co. regarding minimum margins. The petitioners claim they were denied their rights under a statute (15 USCA 78) of the United States.

Jurisdiction to review this case by writ of certiorari is granted the U. S. Supreme Court by U. S. Code 1257 (3).

Summary

The petitioners claim that the Michigan courts enforced obsolete laws (76 ALR 1527) regarding stock margins which were made inopeerative by superseding legislation (15 USCA 78) enacted by congress and that the correct law to apply in this case is 15 USCA 78. The pertinent law is annotated in 1-100 ALR 2d para. 16.

Conclusion

For the reasons set forth in this petition for rehearing, as well as in the Jurisdictional Statement and Appellants' Brief in Opposition to Motion to Dismiss, previously filed, which appeal papers were treated as a petition for a writ of certiorari, rehearing should now be granted.

Respectfully submitted,

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DATED: 4 Nov. 1968

CERTIFICATE OF GOOD FAITH

Pursuant to Rule 58, I hereby certify that the foregoing Petition for Rehearing is Presented in good faith and not for delay, and is restricted to the grounds specified in paragraph 2 of Rule 58.

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